UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.4/447/Add.2
18 May 1993

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-fifth session
3 May - 23 July 1993

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

Comments and observations received from States

ADDENDUM

CONTENTS

	Page
COMMENTS AND OBSERVATIONS RECEIVED FROM MEMBER STATES	1
HUNGARY	2

GE.93-60859 (E)

93-37300

HUNGARY

[Original: English]
[13 May 1993]

1. In evaluating the draft of the International Law Commission the reply of the Hungarian Government to the International Law Commission questionnaire (Yearbook of the International Law Commission, 1976, Volume II., Part One) may be used as a starting point, which, grosso modo agreed with the necessity to codify this field of international law. The reply strongly emphasized that the water management agreements that were in force with respect to Hungary had brought about only partial results form the point of view of Hungarian interests. The same reply would have preferred the application of the concept of hydrographic (drainage) basins.

In our opinion, the latest draft of the International Law Commission as a whole, is worthy of support and it may serve as a good basis for a legally binding international treaty. This approach does not contradict the fact that this response contains critical observations too.

2. The results to date of the codification commenced by the ILC reflect the fact that the international community, as a whole, has by now accepted the existence of general international legal principles and rules governing the relations between States concerning the non-navigational uses of international watercourses. General international law - even in the absence of treaties - limits the freedom of action of the watercourse States. The draft identifies these general principles and rules of international law, and does that with greater authority than the resolutions adopted by international associations of legal science, i.e. Institut de droit international, International Law Association, etc. As it has been proven by other examples too, even a draft is capable of becoming part of international usage, of being a point of reference, both at negotiation aimed at concluding international treaties and disputes related to international watercourse issues.

On the structure of the draft

3. Although it would seem more logical to include the various definitions (arts. 21 (1), 25 (1), 26 (2), 27 (3)) in a single article, the possibility of which is mentioned by the Commentary itself, the approach taken by the draft, which in article 2 gives only the definition of international watercourse (and by that the definition of the watercourse State), seems more advantageous because it stresses the special weight of this notion, by defining the territorial scope of application of the general rules set forth in the draft.

The inclusion of the general obligation to cooperate (art. 8) among the general principles (Part II) is more problematic. This general obligation is presumably identical with the principle of cooperation (the difference being only that the concrete purpose of cooperation is defined: i.e. to attain optimal utilization and adequate protection), which is more general in nature, since it appears in such documents as in the 1970 Declaration of the United Nations General Assembly or the Helsinki Final Act of 1975. Even from a practical point of view it would be better to include the various modes of cooperation, into a general obligation to cooperate, among them the regular

exchange of data (art. 9), procedural obligations concerning projects (arts. 11-19), also management (art. 26) and regulation (art. 27) moving them from among the Miscellaneous Provisions.

Specific comments on single articles

4. Article 1

The previous Hungarian reply to the ILC's questionnaire had already supported the broad interpretation of the non-navigational uses, which includes the utilization and uses of waters and the measures of conservation and protection. This article of the draft fulfils this requirement.

5. Article 2

By defining the term "international watercourse" the draft also defines the territorial scope of the rules contained in the draft. During the almost two decade-long history of the codification, defining the term of international watercourse has been the most difficult and most controversial issue. From the very beginning the restrictive, so-called traditional notion of the term of international watercourse (which can be traced back to the 1815 Congress of Vienna), which limits the term to watercourses forming or crossing boundaries has been in conflict with the wide interpretation, which identifies - mainly as a result of the effect of the ILA Helsinki Rules - international watercourses with the drainage basins (recently the expression of "international catchment area" is used) or with the international river systems (the Commentary here refers to the Paris Peace Treaties. The working hypothesis of 1980 of the ILC tried to solve the conflict of the two perceptions by introducing a functional term, creating a iunctim between the international nature of the watercourse and the transboundary affects: if the consequences of an action taken with respect to a hydrological system affect the territory of another watercourse State, then the watercourse is an international one, in the absence of such consequence, however, it is not international.

It could be still useful to enumerate examples of the most important elements of an "international watercourse", which can be found in the Commentary, including aquifers (para. (5)), while at the same time the exclusion of confined groundwaters, not related to surface waters, can be supported.

6. Articles 3 and 4

Articles 3 and 4 may be considered two of the key provisions of the draft. They start out from premises respecting realities, supported by precedents and underpinned by theoretical considerations, namely that the best way to regulate international relations related to non-navigational uses is to conclude international treaties by watercourse States, which the draft calls watercourse agreements.

The usefulness and need of concluding watercourse agreements are generally recognized (para. (2) in the Commentary to art. 3 in fine) and are in harmony with the basic idea of the Hungarian memorandum of 1976.

The result of this approach is the twofold nature of the regulations concerning international watercourses i.e. one of them related to the watercourse agreements, the other one to the general principles and rules codified in the draft (para. (2) of the Commentary to art. 3).

This parallel nature of the international legal regulation, however, creates problems from both directions.

The Commentary attributes two functions to the general principles and regulations codified in the draft: on the one hand - in the absence of watercourse agreement - they define the rights and obligations of watercourse States (para. (2) of the Commentary to art. 3), on the other hand - as a framework or umbrella treaty (in para. (3) of the same Commentary in fine) - they provide the guidelines of the watercourse agreements to be concluded. The correctness of this latter function is hardly questionable, however it is difficult to envisage, whether each and every one of these general principles and rules could be applied directly, whether they are capable of - in the absence of an agreement - describing with expected precision the rights and obligations of watercourse States.

The draft leaves it to the watercourse States, whether they want to conclude watercourse agreements and gives them the freedom to define the territorial scope of application and subject (ratione materiae) of these agreements. It means, in other words, that there is no obligation to conclude agreements (here the draft follows the explanation of the arbitral award in the Lake Lanoux case, see paras. 18-20 of the Commentary to art. 3), but every watercourse State is entitled to a pactum de contrahendo, i.e. it has the right to initiate negotiations with a view to conclude agreements.

If there are more than two watercourse States to an international watercourse, further problems are to be taken into account. The draft deals with the situation, when one watercourse State's use of the watercourse may be affected to an appreciable extent. We believe that the English (appreciable extent) and the French (de fason sensile) expressions are not in full harmony by the application of a watercourse agreement limited in its territorial scope of application or in its subject. This State is entitled to participate in the negotiations of and to become a party to the agreement (para. (2) of the Commentary to art. 4). The problem, however, is not fully solved, because there is no mention of what will happen, if the parties to the - presumably bilateral - agreement which effects to an appreciable extent the use of the watercourse by a third State, do not recognize the rights of the latter, or make its application impossible.

According to the draft, the purpose of the watercourse agreements is to apply the general principles and rules and to adjust them to the concrete situation. The latter provides wide enough room for specific considerations, since these principles and rules should be taken into account when concluding agreements (para. 4 of the Commentary to art. 3), recognized as guidelines (para. (2) of the same Commentary). Even so, the provision of article 3 is still not unambiguous, may be interpreted as containing certain cogency, which can be proven by the absence of the formula: "if international treaty does not provide otherwise". Even in this latter case the problem may come up - as it is apparent from the Commentary to the Montreal Rules: "... States

concerned are free to agree on a higher level of protection ... such an agreement cannot dispose of the rights of other States or free a State from the responsibility for the protection of the global environment". (ILA, Report of the Sixtieth Conference (1982), p. 158, similarly to art. 1 of the Helsinki Rules, ILA, Report of the Fifty-second Conference (1966), p. 484).

If the rights of other (third) watercourse States, or simply other States (i.e. "global common", as referred to by Arangio Ruiz in his third report, see A/CN.4/440, paras. 89-95) are being harmed by opting out from, excluding or modifying the principles and rules contained in this draft, under the pretence of "apply and adjust", then would it be sufficient to refer the case to the rules of international legal responsibility, or would not the draft require some kind of procedural solution of its own?

Another problem of the relationship between the watercourse agreement and the general principles and rules is that these principles and rules involve also such nations, which are per definitionem in change, meaning that their importance and weight vary in time (see the resolution of the International Law Institute about intertemporal problem in Public International Law (1975)). Such notions are the technical conditions influencing the measure of reasonable and equitable use, interests of the protection of the environment, etc. In what way could, in turn, the development of the general principles and rules affect the watercourse agreements, could this development be qualified as a significant change of circumstance, or is it necessary to adapt the treaties in force (especially the older ones) to the new circumstances? (This approach is envisaged, for example, in the Convention of the Economic Commission for Europe on the protection and use of transboundary watercourses and international lakes/ENVWA/R.53, 28 November 1991.)

7. Articles 5-10 (General principles)

The title of the chapter is rather unfortunate. There are only three such obligations that may meet the traditional parameters of a legal principle, namely the principles of reasonable and equitable utilization, the obligation not to cause harm, and cooperation. In our view the regular exchange of data and information is rather a general obligation, while the lack of hierarchy in the uses of the watercourse is more of a consequence of the principle of reasonable and equitable share, therefore it should rather follow article 6.

The above-mentioned principles of water utilization have their roots in international customary law, but a progressive development of law can also be detected. The reasonable and equitable utilization as well as the obligation not to cause harm, as a pair of principles, have already appeared in the Salzberg resolution (1961) of the Institut de droit international. Contrary to this, the Helsinki Rules (1966) recognized only one key-principle (art. V), that of reasonable and equitable share. While the ILA - drifting away from the mentioned concept - in its Seoul resolution (1986) places the obligation not to cause harm next to the principle of reasonable and equitable share, the Athens resolution of the IDI (1979) - at least in the sphere of protection against pollution - neglects the principle of reasonable and equitable share.

With respect to the development of law, first the essence of the principles, then their relationship to each other are to be identified.

The principle of reasonable and equitable utilization, described in article 5, contains a prima facie axiomatic element, which we consider an especially important one, namely, that it declares the right of the watercourse State to utilization as an attribute of sovereignty (para. (8) of Commentary to art. 5). The immanent limit of this right is the equal and correlative right of other watercourse States to the utilization and benefits of the watercourse.

The inherent limitation within the reasonable and equitable utilization by itself - apart from extreme cases (such as the obvious deprivation of the watercourse State of its rights to utilization, see: para. (2) of Commentary to art. 5 in fine) - does not secure delimitation of the rights to utilization and the obligations to protect the waters against harm. To put it differently the conclusion of an international treaty, a watercourse agreement is required for the realization of the principle mentioned above. In cases of conflicts of utilization, adjustment and accommodation of these uses can be best achieved through special watercourse agreements (see: para. (9) of the same Commentary to art. 5 in fine), at the same time article 7 mentions, that "a watercourse State may not justify a use that causes appreciable harm to another watercourse State on the ground that the use is 'equitable', in absence of agreement between the watercourse States concerned" (italics added, para. (3) of the Commentary).

The factors mentioned above determine the relationship of the principles of reasonable and equitable use and the no harm rule. Prima facie, they would be considered twin-principles, of which the interested parties may choose according to need. However, the International Law Commission - as it is specifically recognized by McCaffrey (The ILC and its efforts to codify the international law of waterways. In: Schweiz. Jahrbuch für Int. Recht, Band XLVII, 1990, p. 50) - chose the primacy of the no harm rule, and gave to the principle of equitable use a subordinate role. The reasons for this decision are as follows: (1) the unambiguity and easier application of the no harm rule compared to the very flexible nature of the equitable utilization rule, which requires the balancing of a number of factors; (2) the no harm rule provides greater protection to the weaker or the downstream State; (3) the principle of reasonable and equitable use is less effective in solving problems related to pollution and environmental protection (ibid., pp. 51-52).

Observations to the no harm rule (art. 7):

The draft of the ILC considers only appreciable harm to be relevant. The emphasizing of the appreciable character of the harm causes not only a problem of interpretation, but also creates a legally relevant discrimination between two degrees of harm. The thesis that the insignificant, small harms are irrelevant, is obviously true. However, the maxim of de minimis non curat praetor tacitly forms part of every legal instrument. The underlining of the "appreciable" extent of the harm leads to the conclusion, that there must be a harmful effect in the "gray zone", between the de minimis harm (which requires no mentioning in the instrument) and the appreciable harm.

Since the no harm rule prohibits the causing of appreciable harm, any act contrary to this is a violation of international law, the illegality of which may be excluded only through agreement, aimed at the realization of reasonable and equitable utilization.

In our judgement the no harm rule should be complemented with a general obligation for prevention, which should not be limited exclusively to the protection against pollution (as it is done in art. 21). This would harmonize with the theory of the - spreading - system of effect analysis. As in its above-cited article Special Rapporteur McCaffrey mentioned, this problem came up also in the work of the ILC, raising the question, what is the standard of responsibility for the violation of the no harm rule (ibid., p. 52, et seq.). In our view this question could be sufficiently solved by a general obligation for prevention. The consequences of its violation, however, are to be established under the rules of international responsibility.

Article 28 about installations is closely related to the general obligation for prevention, which structurally should have been mentioned here.

Also belonging to the obligation for prevention is the rule formulated in the Lake Lanoux case, according to which construction and functioning of abnormal installations, i.e. installations exceeding normal technical and political risks are prohibited (italics added). Hungary attaches a great importance to this rule.

The Commentary identifies the obligation not to cause harm with the maxim of sic utere tuo ut allenum non laedas (para. (1) of Commentary to art. 7). According to authors with authority (Oppenheim-Lauterpacht, Starke, etc., see: Bruhács: Nemzetközi vízjog (Law of the international waterways) (1986), p. 158). The above-mentioned rule expresses the prohibition of the abuse of law, which is obviously much narrower than the general obligation not to cause harm.

8. Articles 11-12 (Planned measures)

Together with the prohibition of causing harm (and the provisions o. environmental protection) these articles belong to that group of rules, which do not require the conclusion of watercourse agreements for their application. Apart from the provisions setting concrete deadlines, Part III codifies customary international law. Even so, it would have been useful to mention the dispute at the 1972 Stockholm Conference on Human Environment over the obligation to provide notification. We have only two observations on the formula used by the draft:

It would be desirable to insert a pactum de contrahendo "with a view to negotiating in good faith for the purpose of concluding a watercourse agreement" into paragraph 1 of article 17, which would be in harmony with the logic and specific provisions (see: arts. 4 and 5) of the draft, and thus it would provide greater guarantees for the honouring of the general principles and rules of international law.

Paragraph 2 of article 17 - as a reflection of the previous concept of reasonable and equitable share (see: the inherent right for constant supervision in arts. VII and VIII of the Helsinki Rules, ILA, Report of the Fifty-Second Conference, pp. 492-494) - prescribes that consultations and negotiations should be based on the principle that reasonable regard should be paid to the rights and legitimate interests of other States. This formula can hardly be justified, since rights are to be respected, and not to be paid regard to, therefore the obligation to pay regard applies only to the interests. For similar interpretation see: the award in the Lake Lanoux case (R.G.D.I.P., 1958, p. 117).

Our objection to the notification-consultation mechanism is based on the fact, that it limits the procedure to a "single-instance". This follows already from, among other, the wording of paragraph 3 of this article and the comment in the Commentary, i.e. "After this period has expired, the notifying State may proceed with implementation of its plans ...".

It could be argued, however, that the existing uses and functioning installations might also have such adverse effects, which, e.g. could be the result of accumulation of latent effects or were unforeseen. (An example of taking into account the latter is the agreement on the use of hydroelectric power on the river Pasvik, between Norway and the Soviet Union (1957) UNTS vol. 312, p. 274.) While the extension of the obligation to consult-notify to this case would be in harmony with the no harm rule and the obligation to cooperate, it would not terminate the application of the utilization rights stemming from territorial sovereignty, it would mean only a small degree of limitation thereupon. (To the analogy of the Lake Lanoux case. R.G.D.I.P., 1958, p. 106.)

9. Articles 20-23 (Protection and preservation)

Part IV of the draft - according to our evaluation - contains those principles and rules of customary international law that evolved in the areas of protection of the environment and defence against pollution. This part also deals with norms in statu nascendi of international law pertaining to the subject, among which - interestingly enough - the provisions of the 1982 Convention on the Law of the Sea, and the instruments worked out by the Economic Commission of Europe also play an important role (e.g. para. (2) of Commentary to art. 20, para. (1) of Commentary to art. 23, and the whole of art. 24 have been based on the Convention of the Law of the Sea).

It would be correct to amend article 20 on the protection and preservation of ecosystems by an obligation to restore the original status of the environment in case of damage. Such a solution would harmonize with paragraph 2 of article 21 dealing with pollution, which requires the reduction and control ("control" and "maitrisent" do not have totally identical meaning!) of pollution, because presumably we may also speak about cleaning up damages which had already occurred.

Finally, it could be noted that it would be more logical to move the definition of "ecosystem" from the Commentary (para. (2)) to the text of article 20.

Article 21 dealing with pollution sufficiently reflects that the protection of water quality of the international watercourses necessitates stricter requirements. However, the enumeration of the relevant damages of paragraph 2 seems superficial, even troubling. What is the purpose of singling out the damaging of the living resources from among all ecological harms? It is undoubtedly true, that it would be necessary to define the forms of various harms, that would best be achieved, however, through watercourse agreements - perhaps agreements on civil law liability damages.

10. Articles 24-25

We have no comments.

11. Articles 26-32

As mentioned earlier, a group of the miscellaneous provisions (arts. 27-28 and arts. 30-31) are logically connected to other articles, therefore they should have been included there.

We agree with the provision dealing with the rights and obligations in times of armed conflicts (art. 29).